

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 9, 2018

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and sections 36, 37, and 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Aurora Heights Management Ltd., with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to refuse to issue an approval under the *Water Act* (Application #00354103).

Cite as: *Aurora Heights Management Ltd. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (9 November 2018), Appeal No. 16-045-ID1 (A.E.A.B.).

**PRELIMINARY MOTIONS HEARING
BEFORE:**

Mr. Alex MacWilliam, Board Chair;
Dr. Nick Tywoniuk, Board Member; and
Ms. Anjum Mullick, Board Member.

Board Staff: Mr. Gilbert Van Nes, General Counsel and
Settlement Officer; Mr. Andrew Bachelder,
Board Counsel; and Ms. Valerie Myrmo,
Registrar of Appeals.

SUBMISSIONS BY:

Appellant: Aurora Heights Management Ltd., represented
by Ms. Gayle Langford, Langford Law Office.

Director: Mr. Todd Aasen, Director, Red Deer-North
Saskatchewan Region, Alberta Environment
and Parks, represented by Ms. Michelle
Williamson and Ms. Barbara Harnum, Alberta
Justice and Solicitor General.

EXECUTIVE SUMMARY

Aurora Heights Management Ltd. (Aurora) applied for a *Water Act* approval to remove a wetland and construct a new stormwater pond as part of a drainage system for a planned residential housing development in the Town of Blackfalds.

Aurora filed a Notice of Appeal with the Environmental Appeals Board (the Board), because Alberta Environment and Parks (AEP) failed to process the application, which resulted in a deemed refusal. AEP filed a motion to dismiss the appeal, arguing no decision had been made and, therefore, the Board did not have jurisdiction to hear the appeal.

The Board requested and received written submissions and held an oral preliminary motions hearing to hear arguments on the following:

“Does the Board have the jurisdiction to accept the Notice of Appeal filed by Aurora Heights Management Ltd. with respect to the application appeal?”

The Board found AEP had an obligation to make a decision regarding Aurora’s application. By failing to do so, the application was deemed refused and, therefore, the Board had jurisdiction to hear the appeal. The Board denied AEP’s request to dismiss the appeal.

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I. INTRODUCTION

[1] This decision relates to a preliminary motion by Alberta Environment and Parks (“AEP”) to dismiss the Notice of Appeal filed by Aurora Heights Management Ltd. (“Aurora” or the “Appellant”) on the grounds the Environmental Appeals Board (the “Board”) does not have jurisdiction to hear the appeal, as no decision has been made that Aurora can appeal.

II. BACKGROUND

[2] On July 15, 2014, Aurora applied to the Director, Red Deer - North Saskatchewan Region, Alberta Environment and Parks (the “Director”) for an approval (“Approval Application”) under the *Water Act*, R.S.A. 2000, c. W-3, on lands legally described as SW 35-39-27-W4M and SE 34-39-27-W4M (the “Lands”), which are jointly owned by Aurora and the Town of Blackfalds (the “Town”). The application is *Water Act* Application #00354103.

[3] The purpose of the Approval Application was to obtain authorization to remove a wetland and construct a new stormwater pond as part of a drainage system for a planned residential housing development (the “Project”). The Approval Application proposed what the Appellant called the “Ultimate Plan,” which focused on a drainage system for the entire Project of 197.69 hectares. The Approval Application also included what the Appellant called the “Interim Scenario,” which provided for drainage of 28.64 hectares into a temporary pond. The Interim Scenario was to be used as the Project was starting up, moving to the Ultimate Plan as the Project neared completion.¹

[4] On September 17, 2014, the Appellant wrote to the Director to advise the Interim Scenario would be pursued until the land for the proposed discharge route, as described in the Approval Application as part of the Ultimate Plan, was purchased.

[5] On July 15, 2015, the Director issued *Water Act* Approval No. 00354103-00-0021 (the “July 2015 Approval”) to Aurora for an interim stormwater management system.

¹ *Aurora Heights Revised Stormwater Management Report*, May 6, 2015, at page 3.

[6] On March 7, 2016, the Appellant applied to AEP to amend the July 2015 Approval, increasing the stormwater pond by an additional 2.66 hectares of land and raising the berm elevation by 0.5 metres, creating a larger zero-discharge pond. The Director issued the amendment to the July 2015 Approval on March 18, 2016.

[7] On September 7, 2016, AEP issued an Enforcement Order to Aurora and two individuals for allegedly filling in part of the wetlands located on the Lands without authority, and ordered Aurora to take measures to remediate the damage to the wetlands (“Compliance Matter”).²

[8] On October 3, 2016, the Appellant requested the Director confirm the Appellant’s understanding the final approval for the Project would be issued once the Compliance Matter was resolved and a permanent outfall was constructed. AEP’s Senior Water Administration Engineer (“Water Engineer”) notified the Appellant on October 6, 2016, AEP Approvals could not respond to the Appellant’s questions regarding the status of the Approval Application until the Compliance Matter had been fully resolved.³

[9] On October 27, 2016, the Appellant filed a “Formal Notice of Concern” with the Director, in which Aurora alleged the Director had failed to process Aurora’s Approval Application. The Appellant advised the Director it would file a Notice of Appeal with the Board if the matter was not resolved within 30 days.

[10] On December 2, 2016, the Appellant filed a Notice of Appeal with the Board, alleging the Director had failed to process the Appellant’s Approval Application.

[11] On January 13, 2017, the Director filed a motion with the Board to dismiss the Appellant’s appeal. The Director stated, until a preliminary decision was reached by the Board, the Director had no further information to provide regarding the appeal and it would be premature to produce the Director’s Record until the jurisdictional question had been decided.

² See: EAB Appeal Nos. 16-049-051. The Enforcement Order was issued to Aurora Heights Management Ltd., Mr. Garry Will, and Mr. Ronald Henschel, for the alleged infilling of wetlands.

³ Aurora’s submission, dated January 20, 2017, at Appendix A.

[12] On January 13, 2017, the Board set the schedule to receive submissions from the Appellant and the Director (collectively, the “Parties”) on the matter of the Director’s preliminary motion to dismiss the Appellant’s appeal. Submissions were received by the Board between January 20 and February 21, 2017.

[13] On September 7, 2017, the Town applied to the Board for intervener status.

[14] On October 6, 2017, the Board provided a letter to the Parties and the Town setting out the matters to be addressed in an oral preliminary motions hearing.

[15] Submissions to the Board were received from the Parties between October 25 and November 6, 2017. The Board scheduled the preliminary motions hearing for December 6, 2017.

[16] On November 30, 2017, the Board confirmed the matter to be dealt with at the oral preliminary motions hearing would be:

“Does the Board have the jurisdiction to accept the Notice of Appeal filed by Aurora Heights Management Ltd. with respect to the application appeal?”

[17] The Board held the preliminary motions hearing on December 6, 2017, in Edmonton, Alberta.

III. SUBMISSIONS

A. Appellant

[18] The Appellant referred to section 115(1)(d) of the *Water Act*, which states:

“A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances: ...

(d) subject to clause (e), the applicant for the approval or licence, if the Director refuses to issue an approval or licence...”

[19] The Appellant submitted section 115(1)(d) does not state the right of appeal is subject only to a formal written decision of the Director denying the approval, but makes specific reference to an applicant's right of appeal if the Director refuses to issue an approval.

[20] The Appellant, referring to the *Interpretation Act*, R.S.A. 2000, c. I-8, stated legislation should be interpreted from the perspective of correcting a wrong, and must be given a fair and liberal interpretation that takes into account the intent of the legislators.⁴

[21] The Appellant noted the Supreme Court of Canada, in *United Taxi Driver's Fellowship of Southern Alberta v. Calgary*, stated a contextual approach to legislative interpretation is required, and legislation should be read "in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."⁵

[22] The Appellant submitted a determination of whether the Board has jurisdiction for the appeal should be based on the following analysis:

- “1. Does the Notice of Appeal identify an action that supports Aurora's claim that AEP Approvals 'refuses to issue an approval'?
2. And if so, is Aurora's claim frivolous, vexatious such that it should be dismissed, or has Aurora raised a question of merit?”⁶

[23] The Appellant stated the Water Engineer notified the Appellant on October 6, 2016, AEP Approvals could not respond to the Appellant's questions regarding the status of the Approval Application until the Compliance Matter had been fully resolved.⁷

[24] The Appellant submitted AEP could have replied proactively, but instead chose not to respond, leaving the Appellant with no option except to file an appeal to the Board.

⁴ Section 10 of the *Interpretation Act* provides:

“An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.”

⁵ *United Taxi Driver's Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 79 at paragraph 8.

⁶ Aurora's submission, dated January 20, 2017, at page 2.

⁷ Aurora's submission, dated January 20, 2017, at Appendix A.

[25] The Appellant stated the Director has not approved or made a decision on the Approval Application.

[26] The Appellant submitted section 141(1) of the *Water Act* challenges the Director's position that the Compliance Matter is ongoing. Section 141(1) states:

“A prosecution for an offence under this Act may not be commenced more than 2 years after the later of

- (a) the date on which the offence was committed, and
- (b) the date on which evidence of the offence first came to the attention of the Director.”

[27] The Appellant argued a contextual interpretation of section 141(1) suggests the legislators intended compliance matters should reasonably end after two years where action has not been taken on the matter.

[28] The Appellant noted over two years have passed since the incident instigating the Compliance Matter occurred. The Appellant submitted the Director's continued reliance on the Compliance Matter as a valid reason to not process the Approval Application raises issues of the duty of fairness owed to applicants and how the Director exercises his discretionary power.

[29] The Appellant argued, rather than dismissing the appeal, the appropriate and equitable remedy would be to set aside or put into abeyance the appeal, subject to resolution of the Compliance Matter.

[30] In the alternative, the Appellant requested the Board consider the appeal of the Appellant's Approval Application and the appeal regarding the Compliance Matter concurrently. The Appellant submitted hearing the appeals together would be expedient and would ensure all relevant information is before the Board, including the opportunity for the Town to present its case.

B. Director

[31] The Director submitted AEP has been consistent in advising the Appellant the Ultimate Plan for stormwater management for the Project could not proceed until an acceptable outlet was established along with the drainage route across private lands.

[32] The Director stated he could not complete his review of the Approval Application until he received confirmation from the Appellant the outlet and drainage route was in place.

[33] The Director argued the Town recently applied for its *Water Act* approval but had yet to secure the required land for a drainage route, demonstrating the conditions necessary for the Ultimate Plan had not been met.

[34] The Director referenced the October 6, 2016 email from the Water Engineer, where the Water Engineer stated the Approval Application review could not continue until the Compliance Matter was resolved. The Director noted the Appellant, in its submission, stated the comments from the Water Engineer meant the Director was refusing to consider or issue an approval. The Director submitted the Appellant's interpretation of the email was unsubstantiated, as the Water Engineer had advised the Appellant previously the proposed Ultimate Plan could not proceed until an adequate outlet and drainage had been identified, and the Water Engineer's comments in the email were a recognition of the importance of the concurrent Compliance Matter, which may impact the Appellant's stormwater plan.

[35] The Director stated the Appellant's Approval Application for the full development of the Project had not been refused or rejected for being incomplete, although the Director alleged the Approval Application had significant deficiencies, including the lack of an adequate outlet for water discharged from the stormwater system. The Director argued given the Approval Application was incomplete, he could not proceed to a decision on the merits of the application.

[36] The Director submitted if the Appellant did not provide information regarding an adequate outlet and acceptable drainage within a reasonable time, the Director might reject the Approval Application. The Director stated if the required information was provided and the

application was determined to be complete, the Approval Application would be considered on its merits and the Appellant would receive a copy of the Director's decision.

[37] The Director argued the fact the Appellant's Approval Application had not been rejected was due to AEP working in good faith with the Appellant, knowing the Town was concurrently working on its *Water Act* application, which might have resolved some of the outstanding issues faced by the Appellant.

[38] The Director submitted it is in the overall public interest for the Director to ensure he has all relevant information required to make sound regulatory decisions regarding environmental and water resources.

[39] The Director argued the Appellant had the opportunity to provide the Director with plans for an alternative discharge outlet, while the Town designed its master drainage plan and secured the off-site drainage route; however, the Appellant failed to do so. The Director stated he could not finalize a plan without knowing where the water is going.

[40] The Director argued it was within his discretion to process the Approval Application in the manner he felt was appropriate.

[41] The Director submitted the issue before the Board is a question of jurisdiction as it deals with statutory conditions required for an appeal. The Director argued if there is no appealable "decision," the Board will not have the necessary jurisdiction to determine if the decision was reasonable, whether the Director properly considered the relevant matters and factors, or whether he interpreted and applied the legislation correctly.

[42] The Director submitted if a situation occurred where there was no action on the Approval Application by the Director, then the Appellant would have the right to seek a judicial review.

[43] The Director argued it would set a dangerous precedent if the Board were to take the position because the Director had not yet issued an approval, the Director had refused the approval. According to the Director, a decision that a deemed refusal exists would be a "slippery slope" that could cause appellants to submit speculative and incomplete applications.

[44] The Director stated the evidence shows AEP consistently requested the Appellant provide confirmation of an adequate water outlet to permit the discharge of water from the proposed stormwater system. The Director explained the Appellant had not provided the requested information.

[45] The Director argued the granting of amendments to the existing approval for an interim stormwater pond demonstrated the matter was ongoing and not refused.

[46] The Director submitted in order for a refusal to exist, there must be positive affirmation there is a refusal; a Director must turn his mind to the matter and issue a letter. It would be the end of a long line of procedures that must be followed.

[47] The Director submitted the “decision” the Appellant alleged the Water Engineer made in the October 6, 2016 email, had not actually occurred.

[48] The Director stated the decisions that can be appealed are found in section 115 of the *Water Act*, but no appealable decision had been made.

[49] The Director submitted it was premature in the approval process to file an appeal.

IV. ANALYSIS

[50] Section 115(1)(d) of the *Water Act* provides:

“A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances: ...

(d) subject to clause (e), the applicant for the approval or licence, if the Director refuses to issue an approval or licence...”

[51] The Appellant submitted the Director, by not making a decision, refused to issue the approval. The Director argued no decision had been made on the Appellant’s Approval Application and, therefore, the notice of appeal filed by the Appellant was invalid and the Board did not have jurisdiction to hear the appeal.

[52] The Appellant submitted the October 6, 2016 email from the Water Engineer left no option but to file a Notice of Appeal.

[53] The Board has considered the Water Engineer's October 6, 2016 email along with the Parties' submissions. The email sets out the Director's position that the Appellant's Approval Application was essentially in abeyance until the Compliance Matter was determined. The Director, in his submissions and testimony at the preliminary motions hearing, stated he had not received all the information necessary to make a decision on the application. Declining to proceed with an application until pre-conditions have been met does not equate to ignoring the application.⁸ A Director has the discretion to determine if an application fulfills the legislative requirements and may decline to approve an application until satisfied those requirements have been met. The October 6, 2016 email is an important development in the matter, but does not amount to a refusal to issue an approval.

[54] On October 27, 2016, when the Appellant filed the "Formal Notice of Concern"⁹ with the Director, the situation changed. The Formal Notice of Concern advised the Director Aurora would file a Notice of Appeal with the Board if there was not a resolution within 30 days. The Appellant was not demanding an immediate decision on the Approval Application, it was requesting a decision from the Director within 30 days, and the Director already had the Approval Application before him for the past four years before the Appellant made its request.

[55] Upon receipt of the Formal Notice of Concern, the Director was required to exercise his discretion and respond to the Appellant. The Director had three options available for his response:

1. notify the Appellant the Approval Application was rejected as incomplete;
2. notify the Appellant the Approval Application was rejected as per section 38(1) of the *Water Act*; or

⁸ Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Tomson Reuters Canada), at 5B.5(a).

⁹ The Appellant filed what it referred to as a "Formal Notice of Concern." This is not a document provided for or defined in the *Water Act*.

3. issue the approval to the Appellant as per section 38(3).¹⁰

[56] Faced with the demand to make a decision, the Director decided to remain silent, which is not one of the options available to the Director. Section 38(1) states: “the Director may issue or refuse to issue an approval....” Nowhere in the legislation does it say the Director may choose to remain silent.

[57] The Director argued a refusal to approve an application cannot exist without a positive affirmation there is a refusal, with the Director turning his mind to the matter and issuing a letter informing the applicant of the decision. If the Board were to accept this argument, the potential for an “absurd” situation would exist where the Director could refuse to make a decision, “sitting on” the application indefinitely, keeping the applicant in a state of uncertainty for potentially an infinite period of time.

[58] The Director stated the Board would be setting a dangerous precedent if it were to say that just because the Director has not yet issued an approval there has been a refusal of the approval, which would lead to a “slippery slope” where applicants submit speculative and incomplete applications. The Board rejects this argument, noting the Director has the discretion to refuse any application that is speculative or incomplete. In addition, this argument presumes applicants would intentionally not submit their highest quality application in order to trigger a right of appeal. The Board does not believe this is a likely event.

[59] The Legislature has entrusted the Director with the discretion to choose when to act in considering an approval application. If the application is incomplete, the Director may choose to wait until further information is provided before making the decision to issue the approval, but the Director must inform the applicant of this decision. If the Director refuses to

¹⁰ Section 38(1) of the *Water Act* states:
“Subject to section 34, the Director may issue or refuse to issue an approval to an applicant to commence or continue an activity.”
Section 38(3) of the *Water Act* provides:
“The Director may issue an approval subject to any terms and conditions that the Director considers appropriate.”

consider whether to exercise discretion, either directly or indirectly, then the regulatory scheme is left with a gap.¹¹

[60] When the Director received the letter from Aurora on October 27, 2016, requesting the Director resolve the matter within 30 days, Aurora was, in effect, asking the Director to exercise his discretionary authority to consider the Approval Application as it existed at that time. The Director had an obligation to state either the Approval Application was rejected or accepted. He failed to do so.

[61] The Board finds the Director's silence, in the face of the October 27, 2016 Formal Notice of Concern, amounts to a refusal, which is appealable to the Board.

V. DECISION

[62] The Board denies the Director's request to dismiss the appeal. The Appellant's application for an approval was refused. Therefore, the Board will hear the Appellant's Appeal.

Dated on November 9, 2018, at Edmonton, Alberta.

Original Signed by

Alex MacWilliam
Board Chair

Original Signed by

Dr. Nick Tywoniuk
Board Member

Original Signed by

Anjum Mullick

¹¹ Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Tomson Reuters Canada), at 5B.5(a).

Board Member